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Opuz v. Turkey: Europe's Landmark Judgment on Violence against Women

by Tarik Abdel-Monem*

Despite wide-ranging efforts by governments in Europe to address domestic violence, the problem continues to exist at alarming levels. According to a 2006 report issued by the Council of Europe, 20 to 25 percent of all women in Europe have experienced physical violence at least once during their adult lives.¹ In Turkey, that number is significantly higher. Researchers have estimated that up to 40 percent of married women in Turkey have been abused by a partner or spouse.² Even more disturbing is the widespread impunity enjoyed throughout Europe by perpetrators of this violence.

A recent decision of the European Court of Human Rights attacks domestic violence head on. On June 9, 2009, the Court announced its judgment in *Opuz v. Turkey*,³ a case brought by a victim of domestic violence against the Turkish government for failing to protect her and her mother from attacks perpetrated by her husband. Ruling for the plaintiff, the Court found that the Turkish government violated three articles of the European Convention on Human Rights:⁴ Article 2, the right to life; Article 3, the prohibition of torture and inhuman treatment; and Article 14, the prohibition of discrimination. Critically, the *Opuz* decision holds governments accountable for failing to take adequate steps to protect victims of repeated domestic violence, even absent any active malfeasance on the state's part. Additionally, the decision marked the first time the Court recognized that the failure of states to address gender-based domestic violence can amount to a form of discrimination under the Convention.

A CYCLE OF VIOLENCE, A FAILURE TO ACT

Nahide Opuz married H.O. in 1995, and the couple settled down in the southeastern Turkish city of Diyarbakır.⁵ Shortly thereafter, H.O. began regularly abusing Opuz and members of her family. In 1995, H.O. attacked Opuz and her mother, threatening to kill them both. Just one year later, H.O. severely beat Opuz, causing bleeding in both her eye and ear. In each of these instances, the local prosecutor filed criminal charges. The local court, however, dismissed both cases after Opuz and her mother withdrew their complaints out of fear for their safety.⁶ This cycle of violence, followed by a failure of local authorities to initiate criminal proceedings against H.O., was repeated numerous times over the next several years, with the attacks becoming progressively more violent.

In February 1998, H.O. pulled a knife and attacked Opuz, her mother, and her sister, incapacitating each for several days. The local prosecutor decided not to file charges against H.O.



Courtesy of Nicola Graham.

because of lack of evidence.⁷ A month later H.O. drove his car into Opuz and her mother, causing serious injuries.⁸ Following repeated death threats from her husband, Opuz filed for divorce and requested police protection.⁹ The local prosecutor filed criminal charges, and H.O. was placed in detention. In October 1998, however, Opuz and her mother again withdrew their complaints out of fear of retaliation. Due to the seriousness of the alleged acts, the local court nevertheless convicted H.O. and sentenced him to three months imprisonment. The sentence was later reduced to a mere fine.¹⁰

In October 2001, H.O. stabbed Opuz seven times with a knife during an argument. Shortly thereafter, Opuz's mother's attorney petitioned the local prosecutor's office, noting that both Opuz and her mother had been previously compelled to withdraw complaints against H.O. because of his continuous death threats.¹¹ Although the court issued a fine for the knife assault, H.O.'s threats continued, and no further charges were filed against him.¹²

The violence came to a climax when Opuz's mother attempted to move to another community in March 2002. H.O. confronted Opuz's mother, and in plain view of a witness, took out a gun and shot the mother. She died instantly.¹³ H.O. was charged with and convicted of murder and sentenced to life in prison.¹⁴ The local court later lowered the sentence to 15 years in light of H.O.'s good behavior during trial. Pending appeal, however, the local court released H.O.¹⁵

In 2002, Opuz brought an application before the European Court of Human Rights, alleging that the Turkish government violated three articles of the Convention. First she argued that the Turkish government violated Article 2,¹⁶ the right to life, and Article 3,¹⁷ the prohibition of torture and inhuman treatment, for the murder of her mother and her own anguish and suffering, respectively.¹⁸ While none of the domestic abuse was inflicted under state supervision, Opuz asserted that the Turkish government violated the Convention by failing to protect her and her mother, despite a known pattern of violent abuse and threats to their lives.¹⁹ Additionally, Opuz argued that Turkey's violations

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of Article 2 and Article 3 also amounted to a violation of Article 14,²⁰ the prohibition of discrimination. Opuz contended that the local authorities' lackadaisical attempts to safeguard her and her mother reflected widespread gender discrimination in Turkish legal institutions and Turkish society in general.²¹

In its defense, the Turkish government argued principally that Opuz failed to exhaust domestic remedies prior to bringing her case to the Court,²² a requirement for admissibility.²³ The Turkish government maintained that local authorities had provided an immediate and tangible response to Opuz and her mother, but that under the applicable domestic law, criminal prosecution depended on complaints lodged or pursued by the victim. Since Opuz and her mother consistently withdrew their complaints, Turkey asserted that authorities were unable to go forward with prosecuting H.O.²⁴

FROM PRIVACY TO POSITIVE OBLIGATIONS: COURT PRECEDENT ON DOMESTIC VIOLENCE

European Court of Human Rights precedent addressing domestic violence against women is scarce. While the Court has adjudicated cases in which women have been the victim of state violence,²⁵ it has rarely addressed cases of domestic violence, where the perpetrator is a non-state actor such as a spouse, partner, or other family member. Finding a state in violation of the Convention in a domestic violence case requires a showing that the government failed to adequately protect a plaintiff from the actions of a private person.

Expecting a state to intervene to protect a private citizen from another private citizen raises considerable policy concerns. The state must know at what point it would need to intervene in a domestic relationship, and whether such an intervention amounts to excessive government interference in private affairs. Indeed, Article 8 of the Convention, the right to respect for private and family life, states specifically that "[t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country."²⁶ In interpreting Article 8 obligations, both the Court and European governments have traditionally considered family life and relationships between private individuals a matter beyond the purview of the state.²⁷

Nonetheless, the Court has developed a body of precedent defining the point at which a government is responsible for intervening in cases of violence or abuse within the private sphere. It first addressed this problem in *Airey v. Ireland*,²⁸ a case in which a low-income woman could not hire an attorney to represent her in divorce proceedings against her abusive husband. Airey argued that Article 8 imposed a positive obligation upon the Irish government to provide access to legal proceedings and services enabling her to seek a divorce. Siding with Airey the Court noted that, although Article 8 generally protects private life from undue interference by governments, it may also at times do the opposite and obligate governments to take affirmative steps to allow individuals the ability to enjoy their private life.²⁹ Airey's personal right to enjoy respect for her private life required an ability to divorce her abusive husband. Ireland's failure to make family law legal services available to Airey thus violated Article 8.³⁰

Subsequent cases, including *Bevacqua v. Bulgaria*, confirmed this new line of reasoning.³¹ The plaintiff in *Bevacqua* sought a divorce and custody of her child from her abusive husband. She alleged that Bulgaria failed to adequately protect her from her husband or initiate proper legal proceedings with due diligence.³² While again recognizing that the primary purpose of Article 8 was to prevent undue state intrusion into private life, the Court reasoned that respecting private and family life may include "a duty to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals."³³ This positive duty arises particularly for the safeguarding of vulnerable individuals.³⁴ Because local authorities had disregarded Bevacqua's complaints, the Court found Bulgaria in violation of Article 8 for failing to implement these positive obligations.³⁵

The Court went even further in *Kontrová v. Slovakia*³⁶ by delineating a specific standard articulating when governments are obligated to intervene in private matters. In *Kontrová*, which offers facts similar to those in *Opuz*, the plaintiff alleged that she had suffered years of physical and emotional abuse by her husband, including a beating with an electric cable that left her unable to work for a week.³⁷ Her husband later threatened to kill himself and their children. Although Kontrová made a series of visits and phone calls to local police regarding these threats, they did little to intervene. Shortly thereafter her husband did in fact shoot and kill their children and himself.³⁸ Kontrová argued and the Court found that Slovakia violated both Article 2 and Article 8, for failing to adequately intervene.³⁹ Importantly, the Court developed the following test detailing when a state must act to protect an individual under Article 2:

For a positive obligation to arise, it must be established that the authorities knew of or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.⁴⁰

The *Kontrová* decision thus solidified a line of Court precedent that state authorities do in fact have positive obligations to intervene within the private sphere in situations of clear and real danger to specific individuals.

THREE VIOLATIONS OF HUMAN RIGHTS

The Court's decision in *Opuz* developed out of its precedent in cases such as *Bevacqua* and *Kontrová*. Yet, the judgment went further than many expected by clearly making prevention of violence against women in the domestic sphere a positive obligation of the state, and the systematic failure to act on this obligation a violation of the Convention's prohibition of discrimination.

After rejecting the Turkish government's argument that Opuz failed to exhaust domestic remedies,⁴¹ the Court proceeded into the merits of her case. Examining Opuz's Article 2 allegation, the Court first reiterated the test enunciated in *Kontrová* — that Article 2 can impose a positive obligation on states to protect life in the private sphere, but not in a way that would impose an impossible burden on governments.⁴² That obligation exists when authorities know or should know that a real and immedi-

The decision recognizes that domestic violence against women is a systemic problem reflecting a fundamental imbalance of power. Although individual acts of violence within the private sphere can be attributed to specific persons, violence against women is generally perpetuated through male domination of judicial and law enforcement institutions. The Court's judgment places a strong burden on states to protect women from domestic violence.

ate risk to life exists, and that their intervention between private parties could reasonably prevent violence from occurring.⁴³ In the specific context of domestic violence, the Court also articulated additional factors that a government should consider in determining when a state should intervene under Article 2 and Article 8, including, among others, the seriousness of the alleged offense; whether or not a weapon was used; the amount of threats and degree of planning behind the violence; the effects of domestic violence on children living in the household; and the previous history of the alleged perpetrator. Essentially, the more serious the alleged domestic abuse, or the more likely it is that serious abuse will continue, the greater the burden on local authorities to properly intervene.⁴⁴

The Court then specifically examined whether Turkey adequately fulfilled its Article 2 and Article 8 obligations by reviewing both the legal and factual context pertaining to Opuz's situation. The applicable domestic law in Turkey's criminal code prevented authorities from independently prosecuting cases without charges filed by a victim unless the alleged assault led to ten days of illness and unfitness for work. For the Court this standard was simply unrealistic, as it would fail to encompass many cases of domestic violence.⁴⁵ Given H.O.'s history of threats and abuse, and the fact that Opuz and her mother had notified local authorities about his behavior numerous times, the Court stated that the authorities should have taken "special measures consonant with the gravity of the situation."⁴⁶ Because the authorities remained passive, despite persistent information that should have compelled them to act aggressively against H.O., the Court found the Turkish government violated Article 2 for the death of Opuz's mother.⁴⁷

The Court then examined Opuz's allegation that H.O.'s abusive treatment of her and the local authorities' subsequent failure to act constituted a violation of Article 3 — the prohibition of torture and inhuman treatment. Like its Article 2 analysis, the Court reiterated the principle that states have a positive obligation in some situations to protect at-risk individuals from Article

3 violations by private citizens.⁴⁸ Noting the history of abuse and threats, as well as "the vulnerable situation of women in south-east Turkey,"⁴⁹ the Court held that Opuz's abusive treatment rose to the level of torture or inhuman treatment, which Article 3 was meant to prohibit.⁵⁰ Given that local authorities had remained relatively passive in their treatment of H.O., the Court held that Turkey violated Article 3 by failing to adequately protect Opuz.⁵¹

Finally, the Court turned to Opuz's allegation that Turkey violated Article 14 — the prohibition of discrimination — by not adequately protecting her and her mother's Article 2 and Article 3 rights. According to Court precedent,⁵² discrimination means "treating differently, without an objective and reasonable justification, persons in relevantly similar situations,"⁵³ and discrimination "may result from a *de facto* situation."⁵⁴ The Court also looked to human rights norms in other jurisdictions to determine how they treated violence against women. In doing so, the Court examined the Convention on the Elimination of All Forms of Discrimination against Women, the Convention of Belém do Pará, and statements by the United Nations Commission on Human Rights and Inter-American Commission on Human Rights.⁵⁵ Based on both the European Convention and these other international law instruments, the Court recognized that "the State's failure to protect women against domestic violence breaches their right to equal protection of the law and that this failure does not need to be intentional."⁵⁶

With these principles in mind, the Court examined whether or not victims of domestic violence in southeastern Turkey enjoyed equal protection of the law. Not surprisingly, the Court found ample evidence of discrimination against women. Reports examined by the Court from the Diyarbakır Bar Association, a local non-governmental organization, and Amnesty International documented numerous accounts of and statistics on domestic violence in southeastern Turkey, along with failures of police to properly investigate claims of abuse and unreasonable delays in judicial proceedings.⁵⁷ The Court found that this indifference

By Christian Koehn.



The town walls of Diyarbakir, Turkey.

and tolerance for domestic violence by local police and courts was widespread throughout Turkey.⁵⁸ Given *Opuz*'s specific situation, and the overall failure of local authorities to protect women from domestic violence, the Court held the Turkish government was in violation of Article 14 for not properly protecting her other Convention rights.⁵⁹

A LANDMARK DECISION FOR WOMEN

The Court's decision in *Opuz* is a landmark in the application of the Convention to domestic violence. The decision recognizes that domestic violence against women is a systemic problem reflecting a fundamental imbalance of power. Although individual acts of violence within the private sphere can be attributed to specific persons, violence against women is generally perpetuated through male domination of judicial and law enforcement institutions.

The Court's judgment places a strong burden on states to protect women from domestic violence. A number of holdings in the *Opuz* judgment support this obligation. First, *Opuz* clearly confirms that states have positive obligations to protect a person's Article 2, Article 3, and Article 8 rights when they are threatened by the actions of other private actors. Second, *Opuz* identifies when such positive obligations rise to the required levels of necessary action. Third, *Opuz* directly states that domestic violence can amount to a violation the Article 3 prohibition

of torture and inhuman treatment. Lastly, *Opuz* states that the failure to effectively protect women from domestic violence can amount to a state's violation of the Article 14 prohibition of discrimination, even if unintentional. The Court's decision thus adequately equips victims of domestic violence with legal recourse through the Convention to successfully pursue cases against states for failing to protect them.

The Court's judgment means that in order to fulfill Convention obligations, European governments must aggressively pursue criminal proceedings in cases of alleged domestic violence, and such proceedings must be effective. Known patterns of continuous and serious abuse, in particular, should not be tolerated. To this end, states should consider amending domestic violence and criminal assault and battery laws to give prosecutors greater discretion to pursue independent claims. These laws should also provide for more aggressive measures for repeat offenders. Even with new laws, prosecutors, judges, and police must redouble efforts to identify dangerous situations and make effective interventions. This might require particular vigilance in situations where victims are fearful of reporting abuse, a likely possibility in domestic violence scenarios.

The *Opuz* decision has clear social implications as well. Failure to adequately enforce Convention protections can arise from discrimination embedded in social institutions and practices. A showing of systemic discrimination can be supported by reports and statistics documenting a lack of sufficient law enforcement activity to protect women from domestic violence. Such indications of discrimination indicate a need for states to make wider reforms across law enforcement generally, including better human rights education and additional training of police and prosecutors.

CONCLUSION

Reaction to the Court's judgment has been overwhelmingly positive, although somewhat cautious. Turkish human rights activists have hailed the ruling as a significant step forward, but recognize that on-the-ground enforcement by indifferent local authorities will remain the key challenge.⁶⁰ Indeed, Turkey already has a long and unfortunate history of discrimination and human rights violations against Kurds and other minorities, and enforcement of the Court's rulings on these issues has been severely lacking. Still, this judgment has enormous potential for women both in Turkey and throughout the continent. Maud de Boer-Buquicchio, Deputy Secretary General of the Council of Europe, noted that the *Opuz* decision could "make a difference for hundreds of thousands of women victims of domestic violence in Europe."⁶¹ It is up to the individual governments, however, to protect the many women who, like *Opuz*, live daily with domestic violence.

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ENDNOTES: *Opuz v. Turkey*: Europe's Landmark Judgment on Violence against Women

¹ COUNCIL OF EUROPE DIRECTORATE GENERAL OF HUMAN RIGHTS, COMBATING VIOLENCE AGAINST WOMEN: STOCKTAKING STUDY ON THE MEASURES AND ACTIONS TAKEN IN COUNCIL OF EUROPE MEMBER STATES 7 (2006), available at http://www.coe.int/T/E/Human_Rights/Equality/PDF/CDEG%282006%293_E.pdf (last visited Nov. 15, 2009).

² TURKISH REPUBLIC PRIME MINISTRY DIRECTORATE GENERAL ON THE STATUS OF WOMEN, NATIONAL RESEARCH ON DOMESTIC VIOLENCE AGAINST WOMEN IN TURKEY 2008 47 (2009), available at http://www.ksgm.gov.tr/tdvaw/doc/Main_report.pdf (last visited Nov. 15, 2009).

³ *Opuz v. Turkey*, App. No. 33401/02 (Eur. Ct. H.R. June 9, 2009), <http://www.echr.coe.int/eng> [hereinafter *Opuz*].

⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights].

⁵ See *Opuz*, *supra* note 3, ¶¶ 7-8.

⁶ *Id.*, ¶¶ 10-11, 13-19.

⁷ *Id.*, ¶¶ 20-21.

⁸ *Id.*, ¶ 23.

⁹ *Opuz*, *supra* note 3, ¶¶ 25-28.

¹⁰ *Id.*, ¶¶ 34-36.

¹¹ *Id.*, ¶¶ 37-39.

¹² *Id.*, ¶¶ 45-46.

¹³ *Opuz*, *supra* note 3, ¶ 54.

¹⁴ *Id.*, ¶¶ 55-57.

¹⁵ See *Id.*, ¶ 57.

¹⁶ European Convention on Human Rights, *supra* note 4, art. 2(1) ("Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.").

¹⁷ *Id.*, art. 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment.").

¹⁸ See *Opuz*, *supra* note 3, ¶¶ 154-56.

¹⁹ *Id.*, ¶¶ 118-19.

²⁰ European Convention on Human Rights, *supra* note 4, art. 14 ("The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.").

²¹ *Opuz*, *supra* note 3, ¶¶ 177-79.

²² *Id.*, ¶ 114.

²³ European Convention on Human Rights, *supra* note 4, art. 35(1) ("The Court may only deal with the matter after all domestic remedies have been exhausted. . .").

²⁴ See *Opuz*, *supra* note 3, ¶¶ 122-23.

²⁵ A well-known example is *Aydin v. Turkey*, in which the Court found Turkey in violation of Article 3's prohibition of torture for the detention, beating, and rape of a young Kurdish woman by state security forces. See *Aydin v. Turkey*, App. No. 57/1996/676/866 (Eur. Ct. H.R. Sept. 25, 1997), <http://www.echr.coe.int/eng>.

²⁶ European Convention on Human Rights, *supra* note 4, art. 8(2).

²⁷ *Lustig-Prean and Beckett v. United Kingdom*, App. Nos.

31417/96 and 32377/96 (Eur. Ct. H.R. Sept. 27, 1999) (military policy banning homosexuals violates article 8); *Norris v. Ireland*,

App. No. 10581/83 (Eur. Ct. H.R. Oct. 26, 1988) (legislation banning homosexual acts violates article 8); *Dudgeon v. United Kingdom*, App. No. 7525/76 (Eur. Ct. H.R. Oct. 22, 1981) (same), <http://www.echr.coe.int/eng>.

²⁸ *Airey v. Ireland*, App. No. 6289/73 (Eur. Ct. H.R. Oct. 9, 1979), <http://www.echr.coe.int/eng>.

²⁹ *Id.*, ¶¶ 32-33.

³⁰ *Id.*, ¶ 33.

³¹ *Bevacqua and S. v. Bulgaria*, App. No. 71127/01 (Eur. Ct. H.R. June 12, 2008), <http://www.echr.coe.int/eng> [hereinafter *Bavacqua*].

³² *Id.*, ¶¶ 5-38.

³³ *Id.*, ¶ 65.

³⁴ *Id.*, ¶ 64.

³⁵ *Bevacqua*, *supra* note 31, ¶ 84.

³⁶ *Kontrová v. Slovakia*, App. No. 7510/04 (Eur. Ct. H.R. May 31, 2007), <http://www.echr.coe.int/eng> [hereinafter *Kontrová*].

³⁷ *Id.*, ¶ 8.

³⁸ *Id.*, ¶¶ 7-14.

³⁹ *Id.*, ¶¶ 53-55 (violation of Article 2), ¶¶ 56-58 (violation of Article 8).

⁴⁰ *Kontrová*, *supra* note 36, ¶ 50.

⁴¹ See *Opuz*, *supra* note 3, ¶ 116 (reasoning that *Opuz*'s inability to pursue effective legal relief from Turkish authorities was in itself the substance of her complaints, and that her case must therefore proceed).

⁴² *Id.*, ¶ 129.

⁴³ *Id.*, ¶¶ 129-30.

⁴⁴ *Id.*, ¶¶ 139-40.

⁴⁵ *Opuz*, *supra* note 3, ¶ 145.

⁴⁶ *Id.*, ¶ 148.

⁴⁷ See *Id.*, ¶ 149.

⁴⁸ *Id.*, ¶ 159.

⁴⁹ *Opuz*, *supra* note 3, ¶ 160.

⁵⁰ *Id.*, ¶ 161.

⁵¹ *Id.*, ¶ 176.

⁵² *D.H. and Others v. Czech Republic*, App. No. 57325/00 (Eur. Ct. H.R. Nov. 13, 2007) (concerning allegations of discrimination against Roma school children), <http://www.echr.coe.int/eng>.

⁵³ See *Opuz*, *supra* note 3, ¶ 183 (citing *D.H. and Others v. Czech Republic*).

⁵⁴ *Id.*, ¶ 183.

⁵⁵ *Id.*, ¶¶ 184-90.

⁵⁶ *Id.*, ¶ 191.

⁵⁷ *Opuz*, *supra* note 3, ¶¶ 193-96.

⁵⁸ *Id.*, ¶ 192.

⁵⁹ See *Id.*, ¶¶ 198-202.

⁶⁰ Nergihan Çelen, *New Protocol Aims to Protect Targets of Domestic Violence*, TODAY'S ZAMAN, Sept. 3, 2009, available at <http://www.todayszaman.com/tz-web/news-185992-new-protocol-aims-to-protect-targets-of-domestic-violence.html> (last visited Nov. 15, 2009).

⁶¹ Maud de Boer-Buquicchio, Deputy Secretary General, Council of Europe, Speech at the Council of Europe Conference of Ministers of Justice (June 18, 2009), available at http://www.coe.int/t/dc/press/news/20090618_disc_sga_en.asp (last visited Nov. 15, 2009).